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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1030

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OPINIONS BELOW

The Seventh Circuit's opinion below is not yet reported but is reproduced in Appendix "A", *infra.* The majority and dissenting opinions of the Seventh Circuit on the prior appeal in this cause are reported in 318 F. 2d 652, and are reproduced in Appendix "B", *infra.*

JURISDICTION.

The judgment of the Court of Appeals was entered on December 28, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

A news article in *Time* Magazine discussed and quoted the 1961 Report of the U. S. Commission on Civil Rights that summarized charges of misconduct made by a Negro family in a Civil Rights Act suit against Captain Frank Pape of the Chicago Police. Prior to *New York Times Co.* v. *Sullivan*, 376 U. S. 254, the Seventh Circuit ruled that a jury could find that the *Time* article exceeded state common law bounds of fair report or comment because *Time* neglected to specify that the ultimate source of the quotation from the Commission's Report was the Negroes' complaint.

After *New York Times* Captain Pape admitted on deposition that he has no extrinsic evidence whatsoever to prove "actual malice." The Seventh Circuit held that none is needed and that *Time's* neglect to specify ultimate source is enough to infer actual malice.

The questions presented are:

(1) Whether an inference of actual malice is raised, and by itself sustains, Pape's constitutional burden of proving actual malice under *New York Times* because petitioner neglected to disclose the ultimate source of the Commission's quoted language?

(2) Whether the Seventh Circuit erred by ignoring Illinois state law requirements imposing a more stringent burden on Pape than the *New York Times* doctrine?

STATEMENT OF THE CASE.

(A) The Origin of Pape's Libel Suit: Monroe v. Pape.

This is a libel action arising from the case of *Monroe* v. *Pape,* 365 U. S. 167; the plaintiff, Captain Frank Pape of the Chicago Police Department, was the defendant in *Monroe* v. *Pape* (R. 6, 8). Pape in this action sues for libel because of a *Time* Magazine news article discussing a Report of the U. S. Commission on Civil Rights that had considered the facts giving rise to *Monroe* v. *Pape* (R. 4-12).

The Negro family who were the plaintiffs in *Monroe* v. *Pape* claimed that their Civil Rights were violated by a squad of Chicago police officers who conducted a pre-dawn search and arrest at their apartment; Captain Pape was then Deputy Chief of Detectives for the City of Chicago and led the raid (R. 16-18). The Monroes charged Pape with entering their apartment without warrant, routing the family from bed at gunpoint, ransacking the apartment, physically abusing Mr. and Mrs. Monroe and the children, demeaning them as Negroes, and holding Mr. Monroe incommunicado at the police station for ten hours (R. 57-72). The Monroes sought damages against Pape and his subordinates pursuant to the Civil Rights Act (R. S. § 1979, 42 U. S. C. § 1983).

The District Court and the Seventh Circuit both had declared that the Monroes had no cause of action. *Monroe* v. *Pape,* 272 F. 2d 365 (1960). However, this Court reversed, holding that the Monroes' grievances against Pape were both cognizable and redressable under the Civil Rights Act; the cause was remanded for trial. *Monroe* v. *Pape,* 365 U. S. 167 (1961).

After trial Pape was found guilty by a jury and a judgment of $8,000 was entered against him on January 24, 1963

(No. 59 C 329 D. C. N. D. Ill.) (R. 55-56). Pape did not appeal and the judgment was satisfied (R. 56, 73-75).

(B) The Official Report of the U. S. Commission on Civil Rights—JUSTICE.

After this Court reversed in *Monroe* v. *Pape* but prior to Pape's trial, the 1961 Report of the U. S. Commission on Civil Rights was issued. The Civil Rights Commission was created by Congress in 1957 (42 U. S. C. § 1975) to investigate civil rights problems and report to the President and Congress. The Commission has declared that its mission is "to collect, study, and appraise information relating to civil rights throughout the country, and to make appropriate recommendations to the President and Congress for corrective action." (Vol. 5, 1961 Report, p. ix).

Volume 5 of the Commission's 1961 Report—entitled *JUSTICE*—contains the Commission's observations and findings concerning *Monroe* v. *Pape*. Chapter 2 of *JUSTICE*, entitled "Unlawful Police Violence" (with the subtitle "Patterns of Police Brutality"), cites and discusses *Monroe* v. *Pape* as one of eleven specifically enumerated examples of nationwide police brutality against Negroes.[1]

"Unlawful Police Violence" is divided into four separate classifications of police brutality: (1) racially motivated

1. The Commission prefaces Chapter 2 with the statement that:

> "The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; *in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations.* In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. *The Commission is of the opinion,* however, that the allegations appeared *substantial enough* to justify discussion in this study." (Emphasis added.)

brutality to enforce segregation; (2) violence as punishment; (3) coerced confessions; and (4) the spontaneous use of force in making arrests. The *Pape* case is included within the fourth category as a spontaneous use of force; the Commission introduces the *Pape* case by the italicized subheading, *Search, seizure, and violence: Chicago 1958. JUSTICE* then summarizes the factual predicate for the *Pape* case by quoting Mr. Justice Frankfurter's language in his dissenting opinion in *Monroe* v. *Pape,* 365 U. S. at 203-04. The Commission's exact language concerning Pape (including its footnotes) reads (R. 16-17):

"**UNLAWFUL POLICE VIOLENCE**

* * * * *

"PATTERNS OF POLICE BRUTALITY

* * * * *

"*Initial contact and arrest*

* * * * *

"*Search, Seizure and Violence: Chicago, 1958.* The Supreme Court of the United States decided the case of *Monroe* v. *Pape*[82] on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[83]

> * * * [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that

> the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family without criminal charges having been filed against him.

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82. 365 U. S. 167 (1961). See discussion in ch. 5 at 72-73, *infra*.

83. These are the words of Justice Frankfurter in dissent, 365 U. S. at 203-204."

(Commission footnote 82 alludes to another discussion by the Commission of *Monroe* v. *Pape* in Chapter 5 of *JUSTICE;* Chapter 5 discusses the probable effect of the decision in securing redress of future police brutality and violations of civil rights.)

The Commission's conclusions from its investigation of police brutality towards Negroes are presented in Chapter 8 of *JUSTICE*. The Commission recommends to the President and Congress that specific remedial civil rights legislation be enacted to discourage and punish police violations of civil rights throughout the country (both in the South and North) (*JUSTICE*, pp. 105-13). *JUSTICE* was signed by all six of the Members of the Civil Rights Commission.[2]

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2. The six Members of the Commission were: Chairman, Dr. John A. Hannah, President of Michigan State University; Vice Chairman, Robert G. Storey, head of Southwestern Legal Center and former Dean of Southern Methodist University Law School; Reverend Theodore M. Hesburgh, President of the University of Notre Dame; Dr. Robert S. Rankin, Chairman of the Political Science De-

(C) The Alleged Libel.

Pape claims libel from an article in the November 24, 1961 issue of *Time;* the article reports and comments upon the Civil Rights Commission's *JUSTICE* Report, and reads in full (R. 103):

CIVIL RIGHTS

Dawdling on the Corner.

The new paperback book has 307 pages and the simple title *Justice.* It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission.*

The bluntly frank report tells of a police officer, referred to only as "Y," in Dawson, Ga., who arrested Negro James Brazier for speeding in November 1957. It quotes Brazier: "When I first entered the door of the jail, 'Y' hit me on the back of the head and knocked me down and said, 'You smart son-of-a-bitch, I been wanting to get my hands on you for a long time.' I said, 'Why you want me for?' 'Y' said, 'You is a nigger who is buying new cars and we can't hardly live. I'll get you yet.' " When Brazier was arrested again five months later by the same officer, Brazier's wife related: " 'Y' then said, 'I told you I would get you.' James said, 'What do you want to hurt me for? I ain't done nothing. I got a heap of little chillun.' 'Y' said, 'I don't give a goddam how many children you got, you're going away from here.' 'Y' pulled out his pistol and stuck it against James' stomach."

Beaten to Death. Continues the report: "Brazier's ten-year-old son pleaded with the officers to stop beat-

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partment; Duke University; Erwin N. Griswold, Dean of the Harvard University Law School; and Spottswood W. Robinson III, Dean of the Howard University Law School.

ing his father and was knocked to the ground by 'Y'; the victim was thrown onto the floor of the police car with his legs dangling outside. 'Y' kicked him twice in the groin, slammed the car door on his legs, threw a hat full of sand into his bloody face, and drove off." Brazier died five days later, and 'Y' was never punished.

Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says *Justice,* "broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers," The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment.

Nursing and Flouting. The commission's report concedes that such cases may be "more dramatic than most," but it declares that police brutality is "a serious problem throughout the U. S.," that Negroes suffer from it most, and that "there are American citizens in the Deep South today who live in fear, partly because they do not know if local policemen will help them or the mob when violence strikes." To remedy the situation, the commission recommends federal grants to upgrade state and local police forces, a federal law permitting police victims to sue local governments instead of only the officers, who can seldom pay adequate judgments, and an amendment to federal law specifically banning police brutality and forced confessions.

Going beyond the report of the panel, Father Hes-

burgh issued a separate statement: "Personally, I don't care if the U. S. gets the first man on the moon if while this is happening on a crash basis we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world."

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* Members of the scholarly panel: Chairman Dr. John A. Hannah, president of Michigan State University; Dr. Robert S. Rankin, chairman of Duke University's political science department; Robert G. Storey, former dean of the Southern Methodist University Law School; Spottswood W. Robinson 3rd, dean of Howard University Law School; Erwin N. Griswold, dean of Harvard Law School; the Rev. Theodore M. Hesburgh, president of Notre Dame University.

(D) The Proceedings Below.

Petitioner originally moved to dismiss Pape's suit on grounds that the publication was fair report of a government document and was fair comment thereon; the District Court granted the motion (R. 15, 94). The Seventh Circuit reversed and (with one Judge dissenting) said that the *Time* article could be found by a jury to exceed Illinois state law bounds of report and comment; the case was remanded to the trial court for further proceedings (318 F. 2d 652). (The majority and dissenting opinions are reproduced in Appendix "B" hereto, pp. 7a-15a.)[3]

After remand, this Court decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Petitioner then took Pape's pre-trial deposition; Pape expressly admitted that

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3. A petition for certiorari was then filed in this Court *solely* to obtain a clarification by the Seventh Circuit concerning the effect of the subsequent and final adjudication of Pape's guilt in *Monroe* v. *Pape*. The petition was denied. *Time, Inc.* v. *Pape*, 375 U. S. 902 (1963).

he commanded the raid at the Monroe apartment and that he was then Deputy Chief of Detectives for Chicago (Pape Dep. pp. 21-28). Pape also admitted that he did not know any of the officers, employees or other personnel of the petitioner, Time, Incorporated; Pape additionally declared that he did not claim that anyone at Time, Incorporated had any particular feeling against him (id. at pp. 34-35). Petitioner filed a motion for summary judgment upon the basis of *New York Times, supra;* Pape's deposition transcript was filed in support of the motion (R. 104). Pape filed no affidavits or other evidence of any kind in opposition to the motion.[4] The District Court, after receiving briefs, granted the petitioner a summary judgment (R. 148-65).

On appeal, the Seventh Circuit again reversed (Appendix A, *infra*). The Court specifically ruled that Pape was a public official within the meaning of the *New York Times* doctrine and that Pape therefore had the burden of proving that *Time* had "actual malice" in publishing the Commission's Report. However, the Court of Appeals, in construing the *New York Times* holding, relied upon its former opinion (Appendix B, *infra*), which had ruled that the *Time* article as a matter of Illinois law could be found to exceed the bounds of fair report and comment. The Seventh Circuit determined that because of the bare fact that *Time* had reworded the Commission's Report, a verdict and judgment holding petitioner guilty of actual malice could be sustained under *New York Times.* The Court of Appeals' holding concerning petitioner's actual malice reads:

> "The burden of proving actual malice is upon Pape. He admitted in his pretrial deposition that he did not know anyone at Time, and, in fact, he does not claim the article was published with any deliberate

4. Prior to Pape's deposition, petitioner had answered written interrogatories disclosing to Pape the names of all persons who were connected with preparation of the article (Supp. Rec. on Appeal).

attempt to harm him. He argues, however, that this question is already settled by reason of our decision in *Pape* v. *Time, Incorporated* (1962), 318 F. 2d 652.

"Our previous decision was made prior to *New York Times* v. *Sullivan*. There, the District Court had dismissed the complaint on the defendant's motion so that all the well-pleaded facts stood admitted before us. We applied Illinois law.

"We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.

"As stated in our previous decision—'. . . Time took the risk when it reworded parts of the Commission's Report that it might go too far. . . .' We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F. 2d at page 655)—'It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow [sic] officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.*'

"We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment."

Petitioner seeks certiorari to review this holding.

REASONS FOR GRANTING THE WRIT.

The Seventh Circuit decided that Pape has sustained his burden of proving "actual malice" upon the sole authority of the Seventh Circuit's earlier and pre-*New York Times* opinion that a jury could find that petitioner had made an unfair report of the Civil Rights Commission's

1961 findings. We submit that the Seventh Circuit's holding is in square conflict both with *New York Times* and this Court's subsequent decisions. *Garrison* v. *Louisiana,* 379 U. S. 64 (1964); *Henry* v. *Collins,* 380 U. S. 356 (1965). The opinion debilitates the *New York Times* doctrine, and indeed, signals its vitiation by rendering meaningless the constitutional requirement of actual malice. (Cf. *Ashton* v. *Kentucky,* ..... S. W. 2d ....., Ky. 1965; *cert. granted* January 17, 1966, No. 619, Oct. Term 1965.)

I.

This Court has declared that the federal constitutional test of actual malice is the publishing of defamatory material "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 279-80 (1963). In *Garrison* v. *Louisiana,* 379 U. S. 64, 74 (1964) the Court defined actual malice in the "reckless" sense as encompassing "only those false statements made with [a] high degree of awareness of their probable falsity. . . ." And the Court's most recent decision concerning actual malice —*Henry* v. *Collins,* 380 U. S. 356, 357 (1965)—prohibits recovery "on a showing of intent to inflict harm, *rather than intent to inflict harm through falsehood.*" (Emphasis added.)

We submit that the Seventh Circuit totally misconceived the heavy burden a public official must satisfy to support a finding of *New York Times* malice. The Seventh Circuit equates First Amendment actual malice with its earlier view that a jury could find that petitioner should not have omitted disclosing the ultimate source of the Civil Rights Commission's Report. In other words, if it be found that petitioner improperly *neglected* to state that the Commission's derivation for its quoted language was in turn a quotation from Mr. Justice Frankfurter's summarization

of the Monroes' complaint, such finding—*standing alone*—creates an inference that would sustain a judgment of actual malice.[5]

We submit that the Seventh Circuit's reasoning flies directly in the face of the strict First Amendment test of actual malice enunciated in *New York Times, Garrison* and *Henry, supra.* The test requires a public official to prove, by evidence "having the convincing clarity which the constitutional standard demands" (*New York Times, supra* at 280-81), that defendant deliberately or recklessly published a defamatory falsehood with intent to injure the plaintiff (see *Garrison, supra* at 74, and *Henry, supra* at 357). Clearly, the petitioner's omission to specify the "source upon the source upon the source" in reporting the contents of *JUSTICE* does not satisfy Pape's burden of proving a deliberate or reckless publishing of falsehood with intent to injure.

The bare omission of the ultimate origin or source of a reported governmental document is only consistent with an innocent (rather than a culpable) state of mind; in a case such as this, a publisher would reasonably believe in the truth or probable truth concerning Pape's conduct because of the official imprimatur of the government and thus report the matter as a fact in the belief that the technical fair report privilege is inapposite. (See, especially, *Lulay* v. *Peoria Journal-Star, Inc.*, ... Ill. 2d ....., No. 39042 M, January 25, 1966.) Plainly, neglecting to disclose the source of an official document does not, as the Seventh Circuit erroneously held, remotely tend to prove the publishing of untruths deliberately or with a "high

5. Pape has admitted that he has no extrinsic evidence whatsoever to prove actual malice in the sense of *either* actual hatred *or* recklessness; and this despite the fact that Pape has engaged in discovery and obtained the names of petitioner's personnel who wrote and edited the article (see Supp. Rec. on Appeal). See Rule 56(e), F. R. Civ. P.

degree of awareness of their probable falsity. . . ." (*Garrison, supra* at 74.)

Indeed, we submit that the instant case presents a classic example of the constitutional vice of the Seventh Circuit's holding. Petitioner's mere non-disclosure that the Civil Rights Commission's source for its language about Pape was Justice Frankfurter's paraphrasal of a complaint cannot sustain a finding of deliberately or recklessly publishing a falsehood because:

> *First,* the Civil Rights Commission, in reporting and discussing the several episodes of police brutality cited in *JUSTICE,* noted that although the charges were not conclusively determined by the Commission, they "are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations." (*JUSTICE,* p. 5.)
>
> *Second, JUSTICE's* report of the Monroes' complaint is within the context of a chapter concerning nationwide police brutality that documents and supports the Commission's recommendations to Congress advocating the enactment and enforcement of unique legislation to proscribe such acts against Negroes—such proposed legislation could only be predicated upon the Commission's belief in the truth of the Monroe's complaint.
>
> *Third,* the Commission in *JUSTICE* reported the *Monroe* v. *Pape* episode under most dramatic and authoritative captions that clearly treated the Monroes' allegations as substantially true: "UNLAWFUL POLICE VIOLENCE"—"PATTERNS OF POLICE BRUTALITY"—"*Initial Contact and Arrest*" and "*Search, seizure and violence: Chicago, 1958.*" (*JUSTICE,* pp. 5-21).

Fourth, the complaint in *Monroe* v. *Pape* was signed and eventually carried to this Court by an able and reputable attorney (Donald Page Moore, Esq.) (see Rule 11, F. R. Civ. P.) (R. 72).

Fifth, two federal judges in the instant case (District Judge Edwin A. Robson and Seventh Circuit Judge Elmer J. Schnackenberg) concluded even before *New York Times* that petitioner's article was non-actionable as a fair report and comment on the Report of the Civil Rights Commission (R. 24-33, 44-45) (See Appendix "B" *infra,* pp. 14a-15a). If such doubt as to the unfairness of the article existed prior to *New York Times,* then *a fortiori* the same facts cannot rise to the dignity of creating an inference that would sustain Pape's post-*New York Times* constitutional burden of proving actual malice.

Sixth, after issuance of the Civil Rights Commission's Report and after publication of the *Time* article, Pape was tried and *adjudged guilty* of the charges made in the Monroes' complaint; Pape did not appeal and the judgment has been satisfied. Save for repeating his own self-serving denial, Pape has submitted nothing in the instant case to rebut the charges finally adjudged to be true in *Monroe* v. *Pape.* Yet the Seventh Circuit by its holding below has directed petitioner to re-try that very lawsuit.

Plainly, we submit, if the petitioner's failure to note that the Commission's ultimate source was a court pleading permits an inference that will support a finding of actual malice, then the *New York Times* doctrine has been scuttled; "actual malice" has no significance or force if it is sustainable from a simple omission such as here. Exactly the same reasoning would easily have permitted Commissioner Sullivan of Montgomery, Alabama (and all of his companion plaintiffs who sued the *New York Times*) to prevail and

collect their astronomical jury verdicts; "actual malice" could simply have been inferred from the fact that the *Times'* advertisement violated Alabama concepts of fair report and comment because of the false and exaggerated statements made about the police and their mistreatment of Negroes (see 376 U. S. at 262-64, 286-90). A comparison of the facts in *New York Times* and the instant case graphically illustrates the danger and the illogic of the Seventh Circuit's ruling that actual malice may be inferred from neglectful omission. The record in *New York Times* (totally unlike the instant case) affirmatively disclosed the following facts concerning the *New York Times'* lack of diligence:

> *First:* The *New York Times* had evidence in its own files (from news material it had previously published) demonstrating the falsity of several statements in the publication (376 U. S. at 263, 287-88).
>
> *Second:* The Secretary of the New York Times Company admitted he could readily discern that on its very face at least one statement in the publication was false (376 U. S. at 263-64).
>
> *Third:* The *New York Times* accepted and published the assailed advertisement without checking its accuracy against anything—either outside sources or the paper's own files (376 U. S. at 287).

This Court held that the *New York Times* could not be found guilty of actual malice because the evidence of record would support "at most a finding of negligence" (376 U. S. at 288). No such degree of fault exists here, but nonetheless the Seventh Circuit ruled that the record could sustain a holding of actual malice. The *New York Times* would plainly have been held liable by the Court below; the Seventh Circuit upon the same record would *infer* actual malice since it did so here upon far less evidence of negli-

gence. We respectfully suggest that unless the Seventh Circuit's most illusory and erosive concept of actual malice is now condemned by a reversal here, the *New York Times* doctrine can readily be circumvented by those who can find courts and juries entirely willing to frustrate secured First Amendment rights.

We submit that the very reason this Court so painstakingly reviewed the evidence in the *New York Times* case was to emphasize that free speech safeguards may not be placed at the peril of jury determination unless and until the proof of both falsity and actual malice is so clear and convincing that a verdict of libel guilt is constitionally permissible. That First Amendment guaranty will be thwarted if inferences or presumptions may be substituted for concrete factual proof of actual malice, and for this reason *New York Times* unequivocally forbids a determination of actual malice upon inferences or presumptions, without any extrinsic or independent proof of actual malice (376 U. S. at 283-84):

> "Such a presumption [of malice] is inconsistent with the federal rule. 'The power to create presumptions is not a means of escape from constitutional restrictions.' *Bailey* v. *Alabama*, 219 U. S. 219, 239; 'the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff. . . .' *Lawrence* v. *Fox*, 357 Mich. 134, 146, 97 N. W. 2d 719, 725 (1959).' "

The Seventh Circuit's opinion, however, declares that a publisher who by omission or neglect exceeds the technical limits of the fair report privilege is *inferrably* guilty of actual malice. If so, then a report of government proceedings is far more dangerous than a report of the same factual material on the publisher's own authority; inaccuracy in reporting non-governmental affairs is only relevant to the issue of truth or falsity and does not remotely

sustain a showing of actual malice.[6] Clearly, the Seventh Circuit has imposed that greater burden in this case and, in so doing, has by-passed the strict evidentiary requirement, embodied in the *New York Times* definition of actual malice. This case, for that reason, has profound and far-reaching constitutional implications.[7]

II.

The Seventh Circuit, in reaching its result, purported to follow its prior opinion that petitioner could be found to have offended Illinois state libel concepts of fair report and comment in rewording the 1961 Report of the U. S. Commission on Civil Rights. Wholly apart from the clear constitutional error of inferring "actual malice" from its pre-*New York Times* evaluation of petitioner's neglect to specify source, the Seventh Circuit also erred by totally ignoring Illinois libel law principles in force both before and after the *New York Times* case was decided.

The Illinois courts have long defined "actual malice" in libel cases to mean "ill will" and "actual intention to injure or defame." *E. g., Judge* v. *Rockford Memorial Hospital,* 17 Ill. App. 2d 365; *McDavitt* v. *Boyer,* 169 Ill. 475; *Anderson* v. *Malm,* 198 Ill. App. 58. The Seventh Circuit completely ignored this definition and in effect held that the *New York Times* case had *decreased* the plaintiff's burden to a showing of "reckless disregard" of truth or falsity

6. Compare the discussion of this point in *Lawrence* v. *Fox,* 97 N. W. 2d 719, 723 (Mich., 1959), a decision that was cited with approval by this Court in the *New York Times* case, 376 U. S. at 280.

7. Moreover the Seventh Circuit, by its rationale, has brought about an absurd result in this particular case, for Pape has been found by a jury to have been guilty—yet defendant is to be held for trial because of an alleged fact that Pape was *not* guilty (*i. e.,* falsity) and petitioner's asserted knowledge that he was not guilty (*i. e.,* actual malice).

rather than ill-will and specific intent to injure. The palpable error of this holding is clearly demonstrated by a most recent decision of the Illinois Supreme Court (announced after the Seventh Circuit's decision below) in *Lulay* v. *Peoria Journal-Star, Inc.*, ... Ill. 2d ..... (January 25, 1966); in *Lulay* the Illinois Supreme Court reaffirmed that the plaintiff's burden of proving actual malice can only be sustained by proving that the publication was motivated by "actual hatred and spiteful intent to injure the plaintiff." Moreover, and signally, the Illinois Supreme Court in *Lulay* specifically admonished:

> "The burden of proving actual malice is always upon the plaintiff, and it would not be the ordinary case where a plaintiff could establish that a news report or discussion of governmental activities was only published because of actual malice. *McDavitt* v. *Boyer*, 169 Ill. 475; *Judge* v. *Rockford Memorial Hospital*, 17 Ill. App. 2d 365. Cf. *Garrison* v. *Louisiana*, 379 U. S. 64; *Lundstrom* v. *Winnebago Newspapers Inc.*, 58 Ill. App. 2d 33."

A similar definition of "actual malice" has been applied in other states (see, *e.g.*, *Stice* v. *Beacon Newspaper Corp.*, 185 Kan. 61, 340 P. 2d 396, cited with approval in the *New York Times* case, 376 U. S. at 279 n. 20). We do not believe that this Court in *New York Times* intended to lighten the public official's burden in those states that subscribe to a more strict definition of "actual malice" than mere "recklessness"; rather we think that the reckless concept of actual malice articulated in *New York Times* specifies the bare *minimum* showing that a public official must make to satisfy his *federal* burden under the First and Fourteenth Amendments. Clearly, a state by its own law may impose *additional and more stringent* requirements before allowing a public official to recover for libel.

The Seventh Circuit compounded its error by refusing

to recognize still another Illinois state law requirement applicable to public officials who sue for libel; such plaintiffs must not only prove actual malice but must also allege and prove special damages. *Lundstrom* v. *Winnebago Newspapers, Inc.*, 58 Ill. App. 2d 33 (1965.) The *Lundstrom* case bears striking resemblance to the case at bar. The plaintiff (an ex-mayor of Rockford, Illinois) claimed libel from a news article reporting the proceedings of a municipal liquor commission; the plaintiff claimed that the news report accused him of taking a bribe. The trial court first ruled that the article was not libelous and dismissed the complaint.

Then, exactly as in the instant case, the dismissal was reversed by the Appellate Court and remanded for trial. *Lundstrom* v. *Winnebago Newspapers, Inc.*, 42 Ill. App. 2d 306 (1962). Thereafter the *New York Times* case was decided and the defendant (like petitioner here) filed a motion for summary judgment which was granted by the trial court. On appeal the Appellate Court affirmed upon the basis of the *New York Times* decision *and* because the plaintiff had failed to plead or prove special damages.[8]

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8. The Court held (58 Ill. App. 2d at 36):

"The complaint further alleges that as a result of the publication [plaintiff] was held in public hatred, contempt and ridicule and has been injured in his good name and reputation. No further allegation of damages is made and no special damages are alleged. The complaint alleges in general terms that the defendants were motivated by malice but we are given no facts from which to draw this conclusion.

"In view of the rule announced in *New York Times Co.* v. *Sullivan, supra,* the complaint does not state a good cause of action unless it alleges actual malice and consequent special damages. In *Gogerty* v. *Covins,* 5 Ill. App. 2d 74, 124 N. E. 2d 602, the court held 'If the language used in the articles is not libelous per se, then plaintiff was required to allege in his complaint that special damages resulted from the publications thereof,

In the instant case Pape does not and cannot plead special damages (R. 14) because he specifically admitted at his deposition that his earnings had nearly tripled since publication of the article (Pape Dep. 30-31, 81).

The *Lulay* and *Lundstrom* cases demonstrate beyond cavil, we submit, that a summary judgment for petitioner would have been granted and affirmed by the Illinois courts. The Seventh Circuit should plainly have affirmed the District Court's summary judgment for petitioner in light of the more stringent Illinois criteria of actual malice.

CONCLUSION.

For the foregoing reasons we respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 31, 1966.

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and the specific nature of such damages and make proof thereof on the trial. A general allegation as to damages is insufficient. Such damages must be alleged with particularity. The complaint herein appears to be lacking in that regard as it alleges only generally that plaintiff suffered damages as a result of the publications.' In the case at bar, we find no assistance from the complaint on the question of special damages and, of course, this failure is fatal."

APPENDIX "A".

Opinion of the Court of Appeals for the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

vs.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 28, 1965

Before DUFFY and SWYGERT, *Circuit Judges,* and GRUBB, *Senior District Judge.*

DUFFY, *Circuit Judge.* Plaintiff Pape brought this suit seeking damages for libel. Jurisdiction was based upon diversity of citizenship. The complaint alleged the defendant, Time, Incorporated, publisher of the national weekly news magazine "Time", had defamed plaintiff in its November 24, 1961 issue. The allegedly libelous story reported the issuance and summarized the contents of the United States Civil Rights Commission's 1961 annual report. This Report entitled "Justice" is in book form. Chapter 2 is devoted largely to a description of alleged police brutality to Negroes.

The Time article entitled "Civil Rights—Dawdling on the Corner", was based largely on Chapter 2 of the Commission's Report entitled "Patterns of Police Brutality." Time reported an incident which it claimed had occurred in Chicago involving brutality by Pape and other police officers while arresting members of a Negro family named Monroe.

In the District Court, defendant moved to dismiss—in effect, urging the complaint failed to state a claim upon which relief could be granted. The District Court granted the motion. On appeal, this Court reversed. *Pape* v. *Time, Incorporated*, 318 F. 2d 652. We stated that the subordinate, vital question was whether Time's story of the Commission's Report of the Pape incident was fair comment.

In our opinion, we pointed out that the question then before us was not what the Commission's Report had said about Pape, but rather, what Time's article had said about the Report. We then noted that Time's article told the reader that the Report stated that Pape and others had actually committed certain acts. In fact, the Report had merely said that these acts were allegations in Monroe's complaint.

We stated "Under Illinois law, governing here, Time can be liable if it goes beyond that limit [fair comment] and states as a fact that which is not true. . . ."

We then said "We conclnde that Time took the risk, when it reworded parts of the Commission Report, that it might go too far. . . . A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission report."

We decided that the complaint stated a claim upon which

relief could be granted, and we reversed and remanded for further proceedings.

Subsequent to remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullican,* 376 U. S. 254. Thereafter, defendant took Pape's pretrial deposition. Pape testified he had been in the Chicago police department since 1933 and was presently a captain of police. He admitted that he and police officers under his command had gone to the Monroe house on the evening in question. At that time, he was deputy chief of detectives for Chicago. He had been appointed to that position by the Commissioner of Police. His permanent rank at that time was lieutenant of police.

In *New York Times,* the Supreme Court stated (376 U. S. p. 283) "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable."

Footnote 23 referred to, stated in part—"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . ." 'It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official. . . ."

Plaintiff urges that the Supreme Court thus confined its holding in *New York Times* to an "elected" public official. Also, that plaintiff was not a "public official" within the meaning of that case because he had neither been elected to his office, nor appointed nor confirmed in his appointment by an elective body.

We do not read *New York Times* v. *Sullivan* as being

limited to an elected public official. The Supreme Court based its decision, at least in part, upon certain precedents involving appointed officials. In one of the cited cases, the libel plaintiff was a Deputy Superintendent of Police for the city of Detroit. *Lawrence* v. *Fox,* 357 Mich. 134, 97 N.W. 2d 719. In another of the cited cases, the plaintiff was the Chief of Police of Los Angeles—*Snively* v. *Record Publishing Company,* 185 Cal. 565, 198 P. 1.

Subsequent decisions to *New York Times* clearly indicate the courts do not understand the rule announced in that case to be confined to elected public officials. In *Henry* v. *Collins,* 380 U. S. 356 (1965), the Supreme Court applied the *New York Times* doctrine to the Chief of Police of Clarksdale, Mississippi. The Chief was an appointed officer.

In *Tucker* v. *Kilgore,* 388 SW 2d 112 (Ky. 1965), the Court applied the *New York Times* doctrine to an ordinary police patrolman in the city of Louisville, Kentucky. See also *State* v. *Browne,* 206 A. 2d 591 (N.J. 1965) and *Matassa* v. *Bel,* 164 So. 2d 332 (La. 1964).

We hold that on the date Pape arrested James Monroe, when Pape held the position of deputy chief of detectives and lieutenant of police, he was a public official as that designation was used in *New York Times* v. *Sullivan.*

We turn, therefore, to consider whether the existence of "actual malice" by Time, Incorporated presented a jury question. The Supreme Court in *New York Times* v. *Sullivan,* stated at 376 U. S. 279-280: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."

The record before us shows that Time, Incorporated was, at least, negligent in printing as established facts, matters and events which the Commission's Report stated were mere allegations in a complaint. But, negligence is not enough.

In *New York Times,* the newspaper admitted it had had evidence in its own files affirmatively showing the falseness of numerous statements in the publication . . . 376 U. S. at pages 287-288; also, that the Times had accepted and published the advertisement without in any way checking its accuracy against outside sources or material in its files. 376 U. S. 287.

The Supreme Court further said—376 U. S. at pages 287-288—"We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."

In *Garrison* v. *Louisiana,* 379 U. S. 64, the Supreme Court applied the *New York Times* rule to criminal libel, holding that actual malice must be proved to convict an individual for libeling a public officer. The Court there defined malice as "only those false statements made with the high degree of awareness of their probable falsity. . . ." 379 U. S. 74.

The burden of proving actual malice is upon Pape. He admitted in his pretrial deposition that he did not know anyone at Time, and, in fact, he does not claim the article was published with any deliberate attempt to harm him. He argues, however, that this question is already settled by reason of our decision in *Pape* v. *Time, Incorporated* (1962), 318 F. 2d 652.

Our previous decision was made prior to *New York Times* v. *Sullivan.* There, the District Court had dismissed the complaint on the defendant's motion so that all the well-

pleaded facts stood admitted before us. We applied Illinois law.

We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.

As stated in our previous decision—". . . Time took the risk when it reworded parts of the Commission's Report that it might go too far. . . ." We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F. 2d at page 655)—"It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow [sic] officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.*"

We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment.

The judgment of the District Court is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

APPENDIX "B".

Former Opinion of the Court of Appeals for the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

v.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

April 25, 1963

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a diversity libel suit charging that Time, Incorporated, publisher of a national weekly news magazine, defamed plaintiff Pape in an article based on *Justice,* volume 5 of the 1961 report of the United States Commission on Civil Rights.[1] The District

1. Created by the Civil Rights Act of 1957, 42 U. S. C. § 1975, to study civil rights problems and report to the President and Congress. The Supreme Court described the Commission's statutory duties in *Hannah* v. *Larche,* 363 U. S. 420, at 441 (1960):

> * * * its function is purely investigative and fact-find-

Court dismissed the complaint on Time's motion, and plaintiff has appealed.

Time's motion admitted, for purposes of this appeal, the well pleaded facts: Plaintiff, at the time of the alleged libel, was Director of Security for Chicago Thoroughbred Enterprises, Incorporated, which operated race tracks in metropolitan Chicago. He was on leave from his position as a captain of Chicago Police. He enjoyed a good reputation.

In its issue of November 24, 1961, Time published the alleged defamatory matter in reporting the filing of *Justice* by the Commission. The material subject of suit appears under "Part VII. Equal Justice Under Law." In Part VII are two chapters: "1. Introduction; and 2. Unlawful Police Violence."

Chapter 2, "Unlawful Police Violence," briefly describes eleven typical cases of police brutality. The Commission states: "The allegations of misconduct are supported in several cases by criminal convictions * * * or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in the study."[2]

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ing. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

2. 5 U. S. Comm. on Civil Rights Report 5 (1961).

The Time article, captioned "Civil Rights—Dawdling on the Corner," [3] was based on that part of Chapter 2 of the Commission Report entitled "Patterns of Police Brutality." Time noted the publishing of *Justice* by the Commission and went on to report incidents in Georgia and Chicago, two of the eleven incidents revealed in the Commission Report. The Chicago incident involved the arrest by Pape and other Chicago police officers of a Negro family named Monroe on Chicago's west side.[4]

This District Court's opinion, sustaining Time's motion to dismiss, was that the article was a fair and accurate account of the Commission's Report, a matter of public interest and legitimate subject of comment of an honest purpose; and that the article did not exceed the bounds of fair comment and was not actionable.

The question is whether the District Court erred in finding, under Illinois law, that the complaint failed to state a claim upon which relief could be granted. The subordinate, vital question is whether Time's report of what the Commission said about the Pape incident is fair comment.

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3. The caption "dawdling on the corner" is taken from a separate statement filed in the Report by Reverend Theodore M. Hesburgh, C.S.C., President of the University of Notre Dame, and a Member of the Commission. In part, Commissioner Hesburgh stated:

> Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis, we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world.

5 U. S. Comm. on Civil Rights Report 168 (1961).

4. Based on the alleged wrongful conduct of Pape and his fellow officers in making that arrest, Monroe brought a civil rights suit which, on appeal, *Monroe* v. *Pape*, 365 U. S. 167 (1961), was remanded for trial to the Northern District of Illinois, Eastern Division.

Time's article introduced the reader to *Justice* as carrying "a chilling text about police brutality" and that "it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission." The reader is told, in a footnote, who the noted educators are.[5] Time's second paragraph begins, "The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Ga." This and the third paragraphs tell of the Georgia incident through quotations, detailing the police brutality, from the victim, Brazier, and his wife, and quotations from the Report. The third paragraph concludes in Time's statement, "Brazier died five days later, and 'Y' was never punished." In the fourth paragraph Time reported the Pape incident.

The Pape incident is set forth in the Commission Report in this way:[6]

> *Search, seizure, and violence: Chicago, 1958.*—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police

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5. Members of the United States Commission on Civil Rights: Chairman Dr. John A. Hannah, President of Michigan State University; Vice Chairman Robert G. Storey, head of Southwestern Legal Center and former Dean of Southern Methodist University Law School; Reverend Theodore M. Hesburgh, President of the University of Notre Dame; Dr. Robert S. Rankin, Chairman of the Political Science Department, Duke University; Erwin N. Griswold, Dean of the Harvard University Law School; and Spottswood W. Robinson III, Dean of the Howard University Law School.

6. U. S. Comm. on Civil Rights Report 20, 21 (1961).

officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[7]

> . . . [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.

Time began its report of the Commission's statement of the Pape incident this way: "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder." It continued: "The police, says

7. The Commission set forth the facts alleged in the complaint by quoting from Justice Frankfurter's dissent in *Monroe* v. *Pape*, 365 U. S. 167, 202-259 (1961).

Justice, broke through two doors * * *." Time then quoted the rest of the statement of the Commission verbatim. The Time paragraph concludes: "The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

We agree with the District Court that Time was not absolutely privileged in writing the article. The absolute privilege of the Commission did not protect Time. It had a "qualified or conditional privilege," *Cresson* v. *Dispatch Printing Co.,* 291 Fed. 632 (D. C. Minn. 1923), to comment fairly upon, and criticize fairly, the Commission report. Under Illinois law, governing here, Time can be liable if it goes beyond that limit and "states as a fact that which is not true * * *." *Cook* v. *East Shore Newspapers Inc.,* 327 Ill. App. 559, 580, 64 N. E. 2d 751, 761 (1945), *Belt* v. *Tribune Co.,* 6 Ill. App. 2d 489, 128 N. E. 2d 638 (1955). "It is fundamental that fair comment and criticism cannot be predicated on an unfair or false statement of facts." *Belt* v. *Tribune Co.,* 6 Ill. App. 2d 489, at 494, 128 N. E. 2d 638, at 640. The rule applies to writing about crime. *Cook* v. *East Shore Newspapers Inc.,* 327 Ill. App. 559, 585, 64 N. E. 2d 751, 763 (1945).

The test of the fairness of the Time article is the meaning which readers of common and reasonable understanding would ascribe to the language used. *Belt* v. *Tribune Co.,* 6 Ill. App. 2d 489, 493, 128 N. E. 2d 638, 640 (1955). And as Justice John C. Lewe said in *Dilling* v. *Illinois Publishing & Printing Co.,* 340 Ill. App. 303, 306, 91 N. E. 2d 635, 637 (1950), "* * * a person of ordinary intelligence should read a newspaper article * * * with ordinarily intelligent discrimination."

The question before us involves not what the Commission Report of 307 pages says of Pape, but only what the Time article says about the Report. The reader is set by

the introduction, conditioned by the Georgia incident and its stark ending, and prepared to read how the Chicago police treated Monroe's family in the very early morning while "ostensibly" investigating a murder. Then the reader is told that *Justice* "says" Pape and others *did* what the Report merely said Monroe's complaint *alleged* Pape and others had done. The closing paragraph, relied on by Time to immunize it from liability, says the officers were not punished—as the article earlier stated "Y", in the Georgia incident, was not punished.

We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far, *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 582, 64 N. E. 2d 751, 761, 763 (1945), quoting Judge O. W. Holmes, Jr. A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report. It is our opinion that a jury could read the Time article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did*. The typical newspaper reader could take from the article the impression that Pape and the other officers were not really investigating a murder when they mistreated the Monroe family, that the noted educators in *Justice* found that the Monroes were mistreated by Pape and the other officers, and that they were not being punished but ought to be.

It is true that the Commission had the facts alleged in the *Monroe* complaint, from which it quoted, investigated sufficiently to justify their use for the Commission's purposes in the Report. But the Commission was careful to state, at the beginning of its Report: "In no case has the Commission determined conclusively whether the complain-

ants or the officers were correct in their statements."[8] The Time article, however, does not say that. The article says that the Commission Report "stands as a grave indictment, since its facts were carefully investigated." But the Report does not say that. The "carefully investigated" statement in Time adds weight to its quotation, substituting the words "says *Justice*" for the words of the Report, "* * * a complaint which alleged that."

Time argues that the "innocent construction" rule requires this court to read the article "innocently," citing *John* v. *Tribune Co.*, 24 Ill. 2d 437, 442, 181 N. E. 2d 105, 108 (1962). We are required by the rule in that case to give the Time article its "natural and obvious meaning." To read the article innocently, Time asks us to read the article as *not* saying what it does say. It says that the Civil Rights Commission said that Pape had, among other things, assaulted the Monroe family and violated their civil rights. In fact, the Commission said that a complaint in a civil action *alleged* that Pape had done those things.

The complaint states a claim upon which relief can be granted. The District Court erred in ordering it dismissed.

This court takes judicial notice that, upon trial of *Monroe* v. *Pape* after remand by the Supreme Court, a verdict and judgment was recently entered for Monroe. After the District Court denied defendants' post-trial motions, except for a reduction of the verdict, Time made a motion in this court to dismiss the appeal for mootness. That motion was taken with the case and is hereby denied.

The judgment is REVERSED, and the cause REMANDED for further proceedings.

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8. 5 U. S. COMM. ON CIVIL RIGHTS REPORT 5 (1961).

SCHNACKENBERG, *Circuit Judge*, dissenting:

The foregoing opinion's importance lies in its alarming invasion of the right of the press to publish its interpretation of the factual situation presented in an official report issued by a commission created by the Congress of the United States. 42 U. S. C. A. § 1975.

From the Commission's report entitled "Justice", it is clear that the Commission had a basis for the statements which it made in its report.[1] It referred, at page 105, to "a comprehensive review of available evidence", while, at page 5, it disclaimed making any conclusive determination as to whether the complainants or the police officers were correct in their statements, this being "a function of a court". But it expressly stated that "allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eyewitnesses, or by *staff*[2] field investigations". That case not having come to trial in court at that time, the Commission, for convenience, expressly quoted the charges of the Monroe complaint as set forth by Mr. Justice Frankfurter in his dissent, 365 U. S. 167, at 203-204.

Justice dealt with numerous other cases where police brutality charges had been made, discussed violence by others than police, considered state and local remedies and the status and rights of the American Indian.

At 112, Justice made recommendations to Congress as to the advisability of remedial legislation. The report was duly transmitted to Congress.

The report known as Justice was privileged and non-

1. Said act required the filing of a report. See § 1975c (b).

2. Italics supplied for emphasis. § 1975d (a) provided that there should be a full-time *staff* director for the Commission.

actionable in a libel suit. A published article which fairly comments upon a governmental report is likewise privileged and nonactionable, under Illinois law. The publication in the case at bar is a fair comment upon the issuance of a governmental report and its contents. Plaintiff cannot force publishers, under threat of libel, to conceal the fact that the Commission pointed to his alleged conduct as a basis for its conclusions and recommendations to Congress.

I would affirm.

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No. 1030

In the
Supreme Court of the United States
October Term, 1965.

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 1030

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Questions Presented

1. Petitioner is in error in presenting the decision of the Court of Appeals as holding that a jury could infer actual malice from petitioner's neglect. ". . . to disclose the ultimate source of the Commission's language . . ."

The Court of Appeals (Petitioner's Appendix A, page 6a) said:

> "As stated in our previous decision— '. . . Time took the risk when it reworded parts of the Commission's Report that it might go too far . . . .' We noted that Time had departed from fidelity to the Commission's Report in order to make the article

more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F.2d at page 655)— 'It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow (sic) officers *did* what the Commission Report merely said the Monroe complaint *alleged* they did.' "

"We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment."

The question presented rather is whether the knowing departure by Time's writers who prepared the article, from fidelity to the Commission's report was a reckless disregard of truth within the Supreme Court's definition of actual malice.

2. Illinois does not impose a stricter burden than the Supreme Court in *New York Times Co.* v. *Sullivan,* 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L. ed. 2d 686, but even if it did it would be immaterial. The rule announced in *New York Times* v. *Sullivan* was a Federal rule of substantive law based upon constitutional guarantees which by definition is not bound by state precedent.

In *New York Times* v. *Sullivan* at page 706 Lawyers Edition, the Court says:

"The constitutional guarantees require, we think a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proved that

the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

REPLY TO PETITIONER'S STATEMENT OF THE CASE

In its statement of the case, petitioner asks the court to note the entire Commission Report: some 370 pages; the pleadings and record in *Monroe* v. *Pape,* and the Federal Civil Rights Act. However, the matter in the Commission's report concerning respondent to which petitioner makes reference in its article appears on page 20 of the Commission Report. The issue here is whether petitioner accurately reported that portion of the Commission Report, as it claims to have done.

All three courts that have examined the evidence, have held that petitioner did not accurately report the Commission's report. The District Court held that the failure was, at most, negligence. (App. 58). While the Court of Appeals for the Seventh Circuit has on two occasions held that the extent of petitioner's fault was for a jury to determine.

In the Court of Appeals' first opinion, *Pape* v. *Time,* 1963, 318 F2d 652, 655, the Court said:

> "The question before us involves not what the Commission Report of 307 pages says of Pape, but only what the Time article says about the Report. The reader is set by the introduction, conditioned by the Georgia incident and its stark ending, and prepared to read how the Chicago police treated Monroe's family in the very early morning while 'ostensibly' investigating a murder. Then the reader is told that Justice 'says' Pape and others *did* what the Report merely said Monroe's complaint *alleged* Pape and

> others had done. The closing paragraph, relied on by Time to immunize it from liability, says the officers were not punished—as the article earlier stated 'Y', in the Georgia incident, was not punished.
>
> "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far . . ."

In its second opinion, *Pape* v. *Time,* the Court of Appeals said (Petitioner's Appendix A, page 6a):

> "We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.
>
> ". . . We hold that a sufficient showing has been made so that a jury could find Time, Incorporated, acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment."

ARGUMENT

Reasons Why the Writ Should Not Be Granted

I.

As pointed out above, the fault of petitioner's article is not its failure to report the source as it would have this court believe but rather a deliberate alteration of the source material.

The complained-of publication in *New York Times* v. *Sullivan* was a paid-for advertisement, prepared by others and presented for inclusion in an edition of the New York Times. Admittedly, the New York Times was on constructive notice of the material in its files, but there was no showing of actual notice of the accuracy or inaccuracy of the advertisement except for the admission of an officer of the corporation that one statement in the publication was inaccurate.

The source of the Time article was the Commission Report. At least four people were involved in preparing the Time article, i.e., a researcher, writer, editor and publisher. Having the Commission Report before them, one of these persons then proceeded to alter the Report, deleting words, so as, in the words of Court of Appeals, to make the article more readable to its readers. In doing so, the Time article said that Pape did what the Commission Report only said he was accused of doing.

Petitioner says that this reckless handling of the Commission Report was negligence. Respondent claims it was willful and wanton, approximating malice.

Not content with simply altering the language of the Commission Report, Time proceeded to hammer home to its readers the truthfulness of the article. As the court said in *Pape* v. *Time, Incorporated,* 318 F2d 652:

> "Time's article introduced the reader to Justice as carrying 'a chilling text about police brutality' and that 'it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission.' The reader is told, in a footnote, who the noted educators are. Time's second paragraph begins, 'The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Ga.' This and the third paragraph tell of the Georgia incident through quotations, detailing the police brutality, from the victim, Brazier, and his wife, and quotations from the Report. The third paragraph concludes in Time's statement, 'Brazier died five days later, and 'Y' was never punished.' In the fourth paragraph Time reported the Pape incident."

This court said in *New York Times* v. *Sullivan,* page 708, Lawyer's Edition:

> "We hold today that the Constitution delimits a State's power to award damages for liable in actions brought by public officials against critics of their official misconduct. Since this is such an action, the rule requiring proof of actual malice is applicable."

The Court of Appeals follows to the letter, this Court's direction:

> "The burden of proving actual malice is upon Pape. . . He does not claim the article was published with any deliberate attempt to harm him. . ."
>
> "We must now determine whether there is sufficient showing in the record before us that Time's state-

ments were knowingly false or made with reckless disregard as to whether or not such statements were false."

"We hold that a sufficient showing has been made so that a jury could find Time, Inc., acted with reckless disregard as to whether or not the reworded statements hereinabove described were true or false. . ."

Petitioner states (page 15 of its petition):

". . . the Seventh Circuit by its holding below has directed petitioner to retry that very lawsuit." i.e., *Monroe* v. *Pape*.

This same point, i.e., that the judgment of *Monroe* v. *Pape* is determinative of the issues here, was raised by petitioner in the Court of Appeals by motion and denied in the first appeal. (Petitioner's Appendix B, page 14A) and was the principal grounds for the Petition for Certiorari filed in No. 324, October Term, 1963, which this Court denied. In the reply to that petition respondent said:

"What petitioner really urges here, is collateral estoppel. If successful, its whole defense is the record of the jury's verdict in *Monroe* v. *Pape*.

"In *Yates* v. *United States*, 354 U.S. 298 (1957), the Court discussed the doctrine of collateral estoppel and, at page 336, says:

'That doctrine makes conclusive in subsequent proceedings only determinations of fact and mixed fact and law that were essential to the decision.'

"Thereafter, on page 338, the same opinion, the Court says:

'The normal rule is that a prior judgment need be given no conclusive effect at all unless it

> establishes one of the ultimate facts of an issue in the subsequent proceedings. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative. *The Evergreen* v. *Numan,* 142 F.2d 927; Restatement, Judgments, sec. 68, comment p. Cf. *Bordonaro Brothers Theatres, Inc.,* v. *Paramount Pictures, Inc.,* 203 F.2d 676, 678.'
>
> "In both the original and amended complaints in *Monroe* v. *Pape,* jurisdiction of the Federal Court was based upon 42 U.S.A., sec. 1983, which provides that 'every person who, under color of any statute . . . of any state . . . subjects . . . any citizen of the United States . . . within the jurisdiction thereof (to) the deprivation of any rights . . . secured by the Constitution and laws shall be liable to the party injured in an action . . . or other proper proceedings for redress.'
>
> "The verdict in *Monroe* v. *Pape,* if applicable to these proceedings at all under the doctrine of collateral estoppel, is of value only in its holding that Pape violated Monroe's rights reserved to him under 42 U.S.C.A. 1983. The verdict in no way found the evidentiary or 'mediate' facts which petitioner presses upon the Court in these proceedings, e.g., that Pape was guilty of assault, intimidation and brutality."

II.

Petitioner cites several Illinois authorities to the effect that plaintiff's claim is barred by its laws as well as *New York Times* v. *Sullivan. McDavitt* v. *Boyer,* 169 Ill. 475, is indicative of all the cases cited. The court there held that the law does not imply malice from actionable words uttered in privileged communication.

The law of libel in Illinois is stated in *Lorillard* v. *Field Enterprises, Inc.,* 1966, 65 Ill. App. 65. At page 73 the Court said:

"A newspaper has a right to publish facts and make fair comment thereon. If it goes beyond that, and the article is of and concerning the plaintiff, and it is not susceptible of an innocent construction, it is libelous. Inasmuch as the words are libelous per se, there can be no defense of fair comment and criticism. *Cooper* v. *Illinois Publishing & Printing Co.*, 218 Ill. App. 95; *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, 128 NE2d 638; *Cook* v. *East Shore Newspapers, Inc., supra.* Since the article imputed a crime to the plaintiff, the language is per se libelous."

and on Page 78, the Court said:

"The last point that must be discussed relates to the issue of damages in cases where the words in question are found to be per se actionable. In order to recover punitive damages in a libel action some malice must be found. If the words are held to be per se actionable, the necessary malice is imputed from the words themselves; the law conclusively presumes malice in law, and general damages, without proof of loss or injury, are conclusively presumed. *Cook* v. *East Shore Newspapers, Inc.*, 327 Ill. App. 559, 595, 64 NE2d 751. In the *Cook* case it was also pointed out that where the article is libelous per se there may also be malice in fact, and the court said: 'Malice in fact is 'a formed design of doing mischief to another.' (*First National Bank of Flora* v. *Burkett*, 101, Ill. 391, 394.) It is also defined as follows: 'actual malice or malice in fact, means a positive desire and intention to annoy or injure another person.' (36 Am Jur p 681.)' The existence of actual malice may be inferred where a defamatory publication is made without proper cause or excuse. Where malice in law or actual malice exists punitive damages may be awarded. *Cooper* v. *Illinois Publishing & Printing Co.*, 218 Ill App 95; *Hintz* v. *Graupner*, 138 Ill 158, 27 NE 935.

"The plaintiff in the instant case may also recover actual or compensatory damages. If the words are libelous per se, it is not necessary to allege or prove special damages, both malice and damages being presumed. *White* v. *Bourguin, supra; Hambric* v. *Field Enterprises, Inc.,* 46 Ill App2d 355, 196 NE2d 489. Allegations of special damage or actual malice are not essential where the matter alleged to defame is libelous per se. *Estill* v. *Hearst Publ. Co.,* 186 F2d 1017 (7 Cir). Actual or compensatory damages also include general damages such as mental suffering and injury to reputation, and these need not be proved by evidence. *Van Norman* v. *Peoria Journal-Star, Inc.,* 31 Ill App 2d 314, 175 NE2d 805."

This Court in *New York Times* v. *Sullivan,* has established a Federal rule which enlarges the privilege of the press by giving it immunity as to mis-statements of fact regarding public officials and it imposes upon those public officials the burden of proving actual malice as defined in *New York Times* v. *Sullivan.* Petitioner here seeks to engraft onto a Federal rule a more stringent application than even this court intended.

Plaintiff's burden of proving malice in this instance should not be extended beyond that imposed upon him by the Court of Appeals. It is for a jury to determine whether petitioner acted with reckless disregard as to whether or not the reworded statements in its article were true or false.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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